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SEC Issues Guidance for Shorter Debt Tender Offers

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On January 23, 2015, the Staff of the U.S. Securities and Exchange Commission (the "SEC") issued a no-action letter that allows certain tender offers for non-convertible debt securities to remain open for five business days, as opposed to the 20 business day period specified in Rule 14e-1 under the Securities Exchange Act of 1934 (the "Exchange Act").[1] The no-action letter supersedes several prior no-action letters that had established market practice for abbreviated tender offers for nearly 30 years.

Takeaways

The new no-action letter is a significant development for liability management practices. It impacts not only the shortened debt tender offers for which it grants relief, but also the planning of tender offers generally and the ability to conduct shortened tender offers that would have been allowed under previous SEC guidance.

1. Longstanding Guidance is Superseded. The letter replaces and significantly revises longstanding guidance on seven to 10 day tender offers for investment-grade debt securities. As a result, issuers and financial advisors conducting shortened tender offers will need to update their offer documents and processes to comply with significant new procedural and substantive requirements.

2. Immediate Widespread Dissemination is Required. A key component of the new requirements is that the tendering issuer must make immediate widespread dissemination of the tender offer documents, including a press release announcement with a hyperlink to website copies of the tender offer documents. Private companies that do not file reports with the SEC will therefore need to make their tender offer documents publicly available in order to comply with the new requirements.

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[1] See Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities (January 23, 2015), available at http://www.sec.gov/divisions/corpfin/cf-noaction/2015/abbreviated-offers-debt-securities012315-sec14.pdf.

3. Relief is not Available for Debt Restructurings Involving Consent Solicitations. The no-action letter extends relief for issuers of high-yield debt securities to conduct shortened tender offers, which were previously available only for investment-grade debt securities. However, the relief is not available for tender offers made in connection with solicitations of consents to amend the terms of the indenture for the debt securities, which can be an important part of debt restructuring. Issuers that wish to combine a consent solicitation with a debt tender offer will instead need to provide a 20 business day offer period.

4. Shortened Tender Offers Cannot be Used in Connection with M&A Transactions. Relief under the new no-action letter is unavailable for tender offers made in anticipation of, in response to, or concurrently with, a merger, change of control or other extraordinary transaction. This restriction is broader than in prior SEC relief for investment-grade debt tender offers. As a result, the criteria in the new no-action letter are more restrictive for investment-grade issuers seeking to conduct refinancings in connection with or contemporaneous with fundamental corporate transactions.

5. Investment-Grade Issuers have Reduced Flexibility. While the letter expands the availability of shortened tender offers to a broader group of issuers, which should allow greater speed and certainty in debt restructurings, the additional new restrictions may make the relief unavailable in many situations. As a result, investment-grade issuers that could have relied on SEC guidance to conduct shortened debt tender offers in the past may find that they are now required to conduct longer refinancing tender offers with offer periods of at least 20 business days.

6. Possible Future SEC Action. The letter also indicates that the SEC Staff will monitor debt tender and exchange offer developments and may issue guidance in the future that could impose additional restrictions on other longstanding debt tender offer practices, similar to those now applied to shortened tender offers.

Five Business Day Tender Offers

In general, Rule 14e-1 under the Exchange Act requires a minimum offer period of 20 business days for all tender offers. However, the SEC has issued prior no-action letters allowing shorter offer periods of seven to 10 business days for investment-grade non-convertible debt securities, subject to expedited communications and other requirements.

The new no-action letter permits shortened tender offers for non-convertible debt securities regardless of credit rating and provides that the SEC Staff will not recommend enforcement action under Rule 14e-1(a) or Rule 14e-1(b) under the Exchange Act if an offeror conducts a tender offer for non-convertible debt securities and the tender offer remains open for a period of at least five business days and satisfies the other criteria in the letter (a "Five Business Day Tender Offer"). This no-action position is effective immediately and supersedes prior no-action letters relating to abbreviated offering periods in non-convertible debt tender offers, including Goldman, Sachs & Co. (March 26, 1986); Salomon Brothers Inc (March 12, 1986); Salomon Brothers Inc (October 1, 1990); and any similar letters.

Criteria

To qualify as a Five Business Day Tender Offer, the offer must satisfy the following detailed requirements set forth in the new no-action letter.

- Debt Securities. The offer must be made for a class or series of non-convertible debt securities, regardless of credit rating.

- Issuer, Subsidiary or Parent Offer. The offer must be made by the issuer, a direct or indirect wholly owned subsidiary or a parent company that directly or indirectly owns 100% of the issuer's capital stock (other than directors' qualifying shares).

- Consideration. The offer must be made solely for consideration consisting of cash and/or Qualified Debt Securities. If Qualified Debt Securities are offered, the offer must also comply with the requirements described below under "Qualifying Exchange Offers." The consideration offered may be a fixed amount of cash and Qualified Debt Securities or an amount of cash and Qualified Debt Securities based on a fixed spread to a benchmark interest rate, subject to announcement and other requirements set forth in the letter. "Qualified Debt Securities" means non-convertible debt securities that are identical in all material respects (including the issuer(s), guarantor(s), collateral, lien priority, covenants and other terms) to the debt securities that are the subject of the tender offer except for the maturity date, interest payment and record dates, redemption provisions and interest rate; *provided* that Qualified Debt Securities must have (i) all interest payable only in cash and (ii) a weighted average life to maturity that is longer than the debt securities that are the subject of the offer.

- Any and All Securities. The offer must be for any and all of the subject debt securities.

- Open to All Holders. The offer must be open to all holders of the subject debt securities. Exchange offers in which Qualified Debt Securities are offered are subject to the additional requirements described below under "Qualifying Exchange Offers."

- No Consent Solicitation. The offer may not be made in connection with a solicitation of consents to amend the indenture or other agreement governing the subject debt securities.

- No Default or Bankruptcy. The offer may not be made if a default or event of default exists under any indenture or material credit agreement to which the issuer is a party; if the issuer is the subject of bankruptcy proceedings or has commenced a solicitation of consents for a "pre-packaged" bankruptcy proceeding; or if the board of directors of the issuer has authorized discussions with creditors to effect a debt restructuring.

- Financing. The offer may not be financed with the proceeds of any "Senior Indebtedness," which means indebtedness incurred to finance all or a portion of the consideration in the offer (excluding indebtedness under any credit facility existing prior to the commencement of the offer) if such indebtedness (i) has obligors, guarantors or collateral (or a higher priority with respect to collateral) that the subject debt securities do not have; (ii) has a weighted average life to maturity less than that of the subject debt securities; or (iii) is otherwise senior in right of payment to the subject debt securities.

- Guaranteed Delivery. The offer must permit tenders prior to the expiration of the offer through guaranteed delivery by means of a certification that delivery will be made no later than the close of business on the second business day after the expiration of the offer.

- Announcement by Immediate Widespread Dissemination. The offer must be announced at or prior to 10:00 a.m., Eastern time, on the first business day of the five business day period by "Immediate Widespread Dissemination": by means of a press release disclosing the basic terms of the offer (including the identity of the offeror, the class of subject securities, the type and amount of consideration being offered and the expiration date of the offer) and containing an active hyperlink or Internet address to copies of the offer to purchase and letter of transmittal, guaranteed delivery instructions and other instructions or documents relating to the offer. The issuer must also promptly announce the offer by email or other electronic communications and other customary methods.

  - Additionally, if the offeror is an Exchange Act reporting company, it must furnish the press release announcing the offer in a Current Report on Form 8-K filed with the SEC prior to 12:00 noon, Eastern time, on the first business day of the offer.

- Changes to the Offer. The offeror must communicate material changes to the offer by Immediate Widespread Dissemination. Any change in the consideration being offered must be disseminated at least five business days prior to the expiration of the offer. Any other material change to the offer must be disseminated at least three business days prior to expiration. As a result, changes may require extensions of the offer. Offerors that are Exchange Act reporting companies must also describe any change in the consideration in a Form 8-K filed with the SEC prior to 12:00 noon, Eastern time, on the first day of the remaining five business day period.

- Withdrawal Rights. Tendering holders must be able to exercise withdrawal rights (i) at least until the earlier of (x) the expiration date of the offer and (y) in the event that the offer is extended, the tenth business day after commencement of the offer, and (ii) at any time after the 60th business day after commencement of the offer if the offer has not been consummated within 60 business days after commencement.

- No Early Settlement. The offeror may not pay the consideration in the offer until promptly after expiration of the offer pursuant to Rule 14e-1(c).

- No Merger or Extraordinary Transaction. The offer may not be made in connection with or contemporaneously with several types of extraordinary transactions. In particular, the offer may not be:

    - made in anticipation of, in response to or concurrently with a change of control or other extraordinary transaction involving the issuer, such as a merger, reorganization or sale of all or substantially all of its consolidated assets;

    - made in anticipation of or in response to other tender offers for the issuer's securities;

    - made concurrently with a tender offer for any other series of the issuer's securities made by the issuer (or its subsidiary or parent) if the effect of such offer would be to add obligors, guarantors or collateral (or increase the priority of liens securing such other series) or shorten the weighted average life to maturity of such other series; or

    - commenced within ten business days after the first public announcement or the consummation of the purchase or disposition by the issuer of a material business or amount of assets that would require furnishing pro forma financial information pursuant to Regulation S-X under the Securities Act of 1933 (the "Securities Act").

Qualifying Exchange Offers

In addition to cash tender offers, the new no-action letter permits qualifying exchange offers with periods of at least five business days. To qualify for the relief, the non-cash consideration must be Qualified Debt Securities and the offering must satisfy the following additional requirements.

- Exempt Offering. The offer must be exempt from the registration requirements of the Securities Act.

- Participants. The offer must be restricted to "Eligible Exchange Offer Participants": Qualified Institutional Buyers, as defined in Rule 144A under the Securities Act, or non-U.S. persons within the meaning of Regulation S under the Securities Act.

  - Holders that are not Eligible Exchange Offer Participants (or their affiliates) must be given an option to receive cash for such holders' debt securities in a fixed amount that approximates the value of the Qualified Debt Securities being offered. The amount must be set forth at the commencement of the offer.

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If you have any questions, please contact any of the following attorneys or your Cadwalader contact:

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